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No.

IN THE

Supreme Court of the United States

October Term, 1983

DONALD GOLDBERG,

Petitioner,

against

WOODCREST NURSING HOME, a partnership, GERALD SCHWARTZ, individually and doing business as WOODCREST NURSING HOME,

Respondents.

Brief in Opposition to Petition for Writ of Certiorari

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Opinions Below.

The opinion of the Court of Appeals for the Second Circuit appears at 706 Fed. 2d 70. The decision of the District Court is reprinted in the appendix at page A-173.

Jurisdiction.

The jurisdictional requisites are adequately set forth in the petition.

Statutes and Regulations Involved.

In addition to the Federal Rules of Civil Procedure set forth in the petition, the following statutes and regulations are involved:

FRCP 13(a):

> "(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction."

42 CFR §405.437:

> "(a) *Principle.* Costs applicable to services, facilities, and supplies furnished to the provider by organizations related to the provider by common ownership or control are includable in the allowable cost of the provider at the cost to the related organization. However, such cost must not exceed the price of comparable services, facilities, or supplies that could be purchased elsewhere.
>
> "(b) *Definitions* (1) *Related to provider.* Related to the provider means that the provider to a significant extent is associated or affiliated with or has control of or is controlled by the organization furnishing the services, facilities, or supplies.
>
> "(2) *Common ownership.* Common ownership exists when an individual or individuals possess

significant ownership or equity in the provider and the institution or organization serving the provider.

* * *

"(d) *Exception.* An exception is provided to this general principle if the provider demonstrates by convincing evidence to the satisfaction of the fiscal intermediary (or, where the provider has not nominated a fiscal intermediary, the Health Care Financing Administration), that the supplying organization is a bona fide separate organization; that a substantial part of its business activity of the type carried on with the provider is transacted with others than the provider and organizations related to the supplier by common ownership or control and there is an open, competitive market for the type of services, facilities, or supplies furnished by the organization; that the services, facilities, or supplies are those which commonly are obtained by institutions such as the provider from other organizations and are not a basic element of patient care ordinarily furnished directly to patients by such institutions; and that the charge to the provider is in line with the charge for such services, facilities, or supplies in the open market and no more than the charge made under comparable circumstances to others by the organization for such services, facilities, or supplies. In such cases, the charge by the supplier to the provider for such services, facilities, or supplies shall be allowable as cost."

Statement of the Case.

This case dealt with Medicare, the relation of the Department of Health, Education and Welfare ("HEW")

to "providers," and the separate interests of persons who had been partners in a provider.

Hospitals, facilities, such as defendant, Woodcrest Nursing Home ("Woodcrest"), and home health agencies are called "providers of services" or "providers" (42 USC §1395x[u]). They furnish services and are reimbursed from Medicare for the reasonable costs of all such services.

The action was brought by HEW to recover moneys claimed to be due as the result of (1) current financing and (2) advance payment for services.

Current financing comprises payments by HEW to help providers further the Medicare program for people over 65; it constitutes an interest free demand loan pursuant to CFR §405.454(g).

Advance payments for services are made by HEW and are based upon estimates and unaudited statements furnished by a provider. Final adjustment is made from time to time after audit.

Payments to providers are made for the plaintiff by intermediaries (42 USC §1395h), and in this case the intermediary was Travelers Insurance Company ("Travelers").

At the relevant times Woodcrest was a provider and it was structured as a general partnership whose partners were the petitioner Goldberg, the respondent Schwartz and three others. Goldberg was Woodcrest's managing partner, with full power to enter into contracts on its behalf.

Among the contracts into which Goldberg entered was one with Orthopedic and Rehabilitation Institute ("ORI"), which was wholly owned by Goldberg and which rendered services to Woodcrest for which it was paid $171,442.

Goldberg's interest in both organizations brought ORI into the Medicare regulations which characterized it as "related" to Woodcrest (42 CFR §405.427[b]), and Woodcrest would not be entitled ordinarily to reimbursement from HEW for an amount greater than the actual cost to ORI of the services rendered.

Aware of the regulations, the parties entered into a special agreement on November 29, 1968, which read as follows (A-7; A-87, 88):

> "In the event that the United States of America or its appropriate governmental sub-division, or any appropriate insurance carrier or fiscal agent of agency, under and pursuant to the Medicare of similar successor program, determines at any time, up to and including the annual audit for any year, but not thereafter, that any charge or charges made by the Orthopedic and Rehabilitation Institute, during such year to the Woodcrest Nursing Home, for care rendered to patients of the nursing home are by virtue of incorrect or inappropriate rate, not reimbursable in part, then such amount or amounts so determined to be excessive of non-reimbursable, will be borne by the Orthopedic and Rehabilitation Institute and repaid to the General Partnership within thirty (30) days after such determination by such governmental or other Agency."

Travelers thereafter caused an audit to be conducted of Woodcrest and determined that HEW should not reimburse Woodcrest for the $171,442 the latter had paid ORI. In determining the amount due from Woodcrest for current financing and advance payments, plaintiff arrived at a net figure, equal to the amount for which it sued, by deducting the $171,442 which Woodcrest had paid (A-12) to ORI. By this time Schwartz was the sole owner of Woodcrest (A-11).

Accordingly, Schwartz and Woodcrest counterclaimed against the plaintiff for reimbursement of the $171,442 and cross-claimed against Goldberg for the same amount, conditionally, that in the event the Court determined that the sums paid to ORI were not reimbursable (A-88), Goldberg was liable for that amount by virtue of the indemnity agreement of November 29, 1968.

When Travelers refused reimbursement to Woodcrest for the money it paid ORI, both Woodcrest and Goldberg asked for an "intermediary hearing" (20 CFR, Chapt. 3, Subpart R, §§ 405.1801-405.1809). As the Court found below, ORI refused to make its books and records available for audit. The books and records were required by HEW so that ORI's costs could be determined.

There were four separate proceedings at which Goldberg was requested to and refused to make ORI's books and records available. First, at the audit (A-8); then at an intermediary hearing (A-12); then at pre-trial discovery; and finally upon a remand to Travelers (A-12, 13). In the absence of such books, Woodcrest could not demonstrate that, although ORI was "related," the parties came under a statutory exception which provided for full reimbursement if it could be demonstrated that

> " 'a substantial part of (ORI's) business activity of the type carried on with (Woodcrest) (was) transacted with others than (Woodcrest) and organizations related to (ORI) by common ownership or control * * *' §405.427(d)" (A-10).

Goldberg's refusal to make ORI's books and records available demonstrates an extreme disregard for his obligations. For the very arbitration which he claims settled the claims between Schwartz and Goldberg resulted in a direction to him to cooperate in the process of effecting a determination of the propriety of ORI's charges. As the Court of Appeals found, the arbitrators dismissed Schwartz's claim for reimbursement, without prejudice and stated (A-12):

> "[n]othing in this AWARD shall preclude Gerald Schwartz from making a claim on the memorandum dated November 29, 1968 amending the General Partnership Agreement for the operation of Woodcrest, but only upon the final determination of a court of competent jurisdiction that charges made by the Orthopedic and Rehabilitation [*sic*] Institute ("ORI") and paid by Woodcrest to ORI should not be reimbursed by the appropriate agency by virtue of incorrect or inappropriate rate. *Dr. Goldberg is directed to cooperate fully in the process of effecting such determination.*" (Emphasis supplied by the Court of Appeals.)

The very judgment which Goldberg claims is *res judicata*, when affirmed by the Appellate Division of the State of New York, Second Department, contained a stay of execution,

"to enable (Schwartz) to litigate his claim for indemnity * * *"

The Court of Appeals pointed out (footnote 10, A-52) that the predicate for the finding in favor of Schwartz against Goldberg was the finding that HEW was not required to reimburse Schwartz.

Reasons for Denying the Writ.

The petitioner presents not even a semblance of an argument that there are special or important reasons for granting the writ. No attempt is made to elevate the reasons offered by petitioner to the character of reasons delineated in Supreme Court Rule 17 as those that would be considered.

No argument is offered to show that the United States Court of Appeals for the Second Circuit rendered its decision in conflict with another federal court of appeals on the matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or has so far sanctioned such a departure by the District Court, as to call for an exercise of this Court's power of supervision.

The differences between Schwartz and Goldberg are of no significance to others than Schwartz and Goldberg. Each of the purported arguments raised by Goldberg is of no importance anywhere, except in this case, and each is utterly without substance.

Dealing with the "reasons" offered by petitioner in the order in which they are presented will demonstrate that

none of them has substance and in fact all are so frivolous as to merit the imposition of sanctions.

The Arbitration Proceeding.

The Court of Appeals found that "nothing could be clearer than the fact that the arbitrators' award was not a final determination of the rights of Schwartz and Goldberg under the ORI Repayment Agreement" (the agreement of November 29, 1968) (A-34).

Arbitration proceedings in New York do not, of themselves, settle all differences that may ever arise between the parties. The award upon which Goldberg relies was conducted under New York law, and as the Appellate Division, First Department, said *In re Todd Shipyards Corp.*, 67 A. D. 2d 646, 412 N. Y. S. 2d 376, 377:

> "That the arbitration award may have different measures of finality as between the parties in different eventualities does not invalidate the arbitration. Cf. *Matter of Riccardi (Modern Linen Supply Co.)*, 45 A. D. 2d 191, 193, 356 N. Y. S. 2d 872, 875 (1st Dept. 1974), affd. 36 N. Y. 2d 945, 373 N. Y. S. 2d 551, 335 N. E. 2d 856 (1975). Multi-step arbitrations and different rights to arbitration as between the parties and even advisory arbitration awards are not unknown to the law. Cf. *Alexander v. Gardner-Denver Co.*, 415 U. S. 36, 94 S. Ct. 1101, 39 L. Ed. 2d 147 (1974); *Wertheim & Co. v. Halpert*, 65 A. D. 2d 724, 411 N. Y. S. 2d 11 (1st Dept. 1978); see *Board of Education v. Yonkers Federation of Teachers*, 46 N. Y. 2d 727, 413 N. Y. S. 2d 370, 385 N. E. 2d 1297 (1978)."

The direction of the arbitrators to Goldberg to cooperate in the determination of whether and to what extent the indemnity claim was reimbursable is a clearly enforceable provision of the arbitration award.

> "Traditionally, arbitrators have been licensed to direct such conduct of the parties as is necessary to the settlement of the matters in dispute * * *" (Desmond, J., in *Ruppert v. Egelhofer,* 3 N. Y. 2d 576, 581, 170 N. Y. S. 2d 785, 788).

While Goldberg prates about the arbitration award as settling the issues between the parties, by refusing to cooperate and trying to avoid the indemnity agreement, he is seeking to unsettle the issues and avoid the clear direction of the arbitrators.

In addition, he seeks to avoid the arbitrators' direction that he cooperate and abide by the indemnity agreement. The agreement clearly states (A-50) that when an appropriate insurance carrier or fiscal agent determines that any charge by ORI was not reimbursable, then such amount as is determined to be nonreimbursable would be borne by ORI.

The fiscal agent has found that the charges were not reimbursable by reason of the fact that they were wrong (because ORI was related), and that the cost could not be determined (because Goldberg has refused to cooperate or to produce ORI's records and books).

Estoppel and No Damages.

The Court of Appeals found as a fact that respondent made payments to ORI in the sum of $171,442 (A-8), and

that HEW refused to reimburse respondent for its payments to ORI (A-9).

Goldberg, himself, admitted the loss in his pleadings. His pleadings admitted paragraphs 20, 24, 25 and 26 of the cross-claim which were incorporated in paragraph 27 of the cross-claim (A-87).

Paragraph 20 (A-84) alleges that the services rendered by ORI were at a total cost to Woodcrest of $171,442; admitted.

Paragraph 24 alleges (A-86) that Woodcrest was entitled to receive reimbursement from plaintiff for its costs of $171,442; admitted.

Paragraph 25 (A-86) alleges that Travelers determined that Woodcrest was not entitled to reimbursement; admitted.

Paragraph 26 (A-86) alleges that plaintiff is indebted to Schwartz for the $171,442; admitted.

It does not need much argument to demonstrate that paragraph 27 of the cross-claim (A-87) was directed against petitioner and, as set forth in Rule 10 of the Federal Rules of Civil Procedure:

> "Statements in a pleading may be adopted by reference to a different part of the same pleading * * *."

The failure of petitioner to deny the statement of damages to respondent is clearly an admission (FRCP Rule 8[d]).

Since the record is clear that the reason for the refusal to reimburse Woodcrest is that ORI charged the wrong rate because it is a related organization, and since the true rate is not calculable because Goldberg hid ORI's books, Goldberg's complaint about a failure on Schwartz's part to show a loss is really a last resort to flim-flam.

It is true that Woodcrest and Schwartz are and were unable to demonstrate what the appropriate charge should have been. But that was because Goldberg has refused to produce the books and records of his wholly owned company, ORI, and for no other reason. It is for that that the District Court ordered a judgment against Goldberg "for failure to cooperate under the arbitration decision" (A-151).

The estoppel claim of petitioner is a most recent addition to his armory, but it should have no effect. Estoppel is an affirmative defense, which should be pleaded. Where, as in the case at bar, it is not pleaded, was not called to the attention of the District Court and not passed upon, it may not be raised on appeal. *Hartridge v. Aetna Cas. & Sur. Co.*, C.A. Ark. 1969, 415 F. 2d 809; *North Central Truck Lines, Inc. v. U. S.*, D. C. Mo. 1974, 381 F. Supp. 1217.

The Propriety of the Cross-Claim.

As the Court of Appeals found (A-52):

> "The cross-claim (against Goldberg) was raised conditionally, as Schwartz asserted that 'in the event' he was held liable on the United States' claim he was entitled to payment pro tanto from Goldberg."

The genesis of the cross-claim is the claim by the plaintiff for a balance as a "net amount" (A-56, A-73) due from Schwartz to plaintiff as the result of the disallowance of reimbursement for the $171,442 paid by Schwartz to ORI. Schwartz disputed the disallowance, and he pleaded a claim for that amount as a counterclaim. Since the claim arose from the same transaction as that upon which HEW sued Schwartz, it was required to be pleaded by Rule 13(a) of the Federal Rules of Civil Procedure, which states:

> "(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction."

The right to counterclaim and even the obligation to counterclaim arose from FRCP 13. Certainly as Rule 13(a) has been construed, a counterclaim arising "out of the transaction or occurrence that is the subject matter of the opposing party's claim" is a compulsory counterclaim (*United States v. Eastport Steamship Corp.*, 255 F. 2d 795 [2d Cir. 1958]).

In *Frederick v. United States*, 386 F. 2d 481, 488 (5th Cir. 1967), the Court held:

> "Our conclusion is that when the sovereign sues it waives immunity as to claims of the defendant which assert matters in recoupment—arising out of the same transaction or occurrence which is the subject of the government's suit * * *."

Running accounts have always been recognized as constituting a "transaction" for purpose of Rule 13. In *Parmelee v. Chicago Eye Shield Co.*, 157 F. 2d 582 (CCA 8, 1946), the Court cited with approval the case of *Story & Isham Commercial Co. v. Story,* 100 Cal. 30, 34, page 671, and quoted:

> "The plaintiff is not at liberty to select an isolated act or fact, which is only one of a series of acts or steps in the entire transaction, and insist upon a judgment on this fact alone, if the fact is so connected with others that it forms only a portion of the transaction. The transaction which was the foundation of the cause of action set forth in the complaint herein is not limited to the facts therein set forth, but includes the entire series of acts and mutual conduct of the parties in the business or proceeding between them which formed the basis of their written agreement."

The Second Circuit Court of Appeals held in *Lesnik v. Public Industrial Corporation,* 144 F. 2d 968 (1944), that "transaction" must be given a liberal interpretation. It then cited (144 F. 2d at p. 975) the language of the Supreme Court in *Moore v. New York Cotton Exchange,* 270 U. S. 593, 610, 46 S. Ct. 367, 371, 70 L. Ed. 750, where it said:

> " 'Transaction' is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship."

No relationship could have a more logical nexus for purposes of a counterclaim than the relationship between plaintiff's claims and Schwartz's counterclaim.

The cross-claim against Goldberg is authorized by Rule 13(g), which states:

> "(g) Cross-Claim Against Co-Party. A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant."

The purpose of Rule 13(g) is to permit all matters between all of the parties to be adjudicated in one, rather than many, trials, so long as there is a "logical relationship" between the cross-claim and the "transaction or occurrence" which is the subject matter of the complaint or counterclaim (*Lasa, etc., v. Southern Builders, etc.*, 414 F. 2d 143, 147, CA 6, 1969).

The claim of Schwartz rested upon the suit resulting from the disallowance of Woodcrest's payments to ORI. The counterclaim rested upon those same facts, and the cross-claim rested upon the same facts plus Goldberg's unequivocal promise to pay Schwartz 30 days after the claim was disallowed.

Goldberg's claim that Schwartz must first show damage is belied by their agreement and, as well, by the principle that Rule 13(g) permits the assertion of a cross-claim if the party against whom it is asserted "is or may be liable." Thus, in *Bohn v. American Export Lines*, 43 F. Supp. 228,

S.D.N.Y. 1941, the Court permitted a cross-claim even though at common law liability of the "cross-claimee" would not accrue until after judgment. The Court said:

> "although at common law, as pointed out in the *Uvalde* case *supra*, the liability sued upon had first to become fixed by a judgment, I think under Rule 13(g) * * * that element is no longer requisite, for it is plain that a cross-claim permitted thereunder 'include a claim that the party against whom it is asserted is or may be liable to the cross-claimant.' "

It was appropriate to have plaintiff's liability to Woodcrest for the ORI charges determined in this case. It was just as appropriate to have ORI's liability for the same charges to Schwartz and Woodcrest determined.

Finally, Goldberg claims that ORI rendered services under the authority of the letter to Travelers dated November 19, 1968, "on a cost or charge basis" (34), and that Travelers unilaterally and without just cause rescinded that authority (35). The claim is unadulterated nonsense. The very letter upon which Goldberg relies appears at A-183 and states the following:

(a) the cost of services and facilities and supplies furnished to a related provider "are includible in the allowable cost of the provider at the cost to the related organization";

(b) An exception to the cost of the related organization rule is provided if it is demonstrated

(1) the supplying organization is bona fide;

(2) a substantial part of the business of the type carried on with the provider is carried on with third parties;

(3) there is an open, competitive market for the type of services furnished;

(4) the services rendered are those which commonly are obtainable from third parties by institutions such as the provider; and

(5) the charge to the provider is in line with the charge for such services in the open market and no more than the charge made by the organization (ORI) to others for such services.

None of the bases for making any kind of allowance was available in the absence of ORI's records, which Goldberg refused to provide.

The District Court found as a fact that Goldberg failed to cooperate under the arbitration award, and that finding was based upon his refusal to produce ORI's records (A-172).

The Intermediary Panel found that there was "no sound auditable way to make the cost determination because the necessary records were not made available to the Intermediary (by Goldberg)" (A-16).

The Court of Appeals affirmed the finding that

> "Apparently there was no dispute in the district court as to the fact that Goldberg did not fully cooperate—even after remand by the court for reconsideration—in the hearing panel's review of

Woodcrest's claims regarding its ORI Payments. At every stage, the hearing officials stated that ORI had withheld needed information, with the result that its costs—the maximum rate of reimbursement normally allowed under 42 C.F.R. §405. 427(a)—could not be determined. In the circumstances, we find no error (A-37, 38)."

Conclusion.

There having been no attempt made by petitioner to demonstrate that this case falls within any of the enunciated guidelines for this Court to entertain a writ of certiorari, the case having limited significance and affecting only the particular parties and the arguments offered by petitioner having no supportable foundation, the petition should be denied.

Dated: New York, New York
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